

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS MARTIN BENEDICT,

Defendant-Appellant.

UNPUBLISHED

June 16, 1998

No. 198607

Macomb Circuit Court

LC No. 94-002943 FH

Before: Markman, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with a dangerous weapon, MCL 750.82(1); MSA 28.277(1), and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). Defendant subsequently pled guilty to being an habitual offender, fourth offense, MCL 769.12(1)(b); MSA 28.1084(1)(b). After vacating the assault with a dangerous weapon conviction, the trial court sentenced defendant to six months to fifteen years' imprisonment pursuant to the habitual offender conviction, and to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that he was denied his rights to due process and a fair trial because the trial court failed to properly instruct the jury on intoxication as a defense to a specific intent crime. Because defendant did not object to the trial court's jury instructions, review is foreclosed absent manifest injustice. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997). We agree with defendant that the trial court incorrectly read CJI2d 6.2 to the jury. However, whether an instruction is error requiring reversal depends on whether it was prejudicial. *People v Vaughn*, 447 Mich 217, 236; 524 NW2d 217 (1994). Here, the trial court instructed the jury on all elements of the charged crime and, upon the jury's request, repeated the instructions regarding the elements of assault and the requisite specific intent. Furthermore, the jury was informed that defendant's intoxication may have prevented him from forming the specific intent to assault the officer. Therefore, the trial court's error did not prejudice defendant and does not require reversal of defendant's convictions.

Next, defendant argues that the trial court should have granted his motion for a dismissal and/or mistrial, which was based upon the prosecution's failure to provide a missing page of a police report in response to defendant's discovery request. According to defendant, if the prosecution had timely produced the entire police report, then defense counsel would have made an earlier request for a copy of the 911 tapes. Questions of noncompliance with discovery orders and appropriate remedies are subject to the trial court's discretion. *People v Clark*, 164 Mich App 224, 229; 416 NW2d 390 (1987). The court must determine whether the defendant's interest in preparing his own case, or his opportunity to test the authenticity of the prosecution's evidence has been prejudiced by noncompliance with a discovery order or agreement. *Id.* at 486-487.

Even assuming that defense counsel received a complete version of the police report upon request, counsel would have been unable to request the 911 tapes because the tapes are reused after thirty days. Furthermore, defendant had approximately four days to review the missing page before the officer who wrote the police report testified at trial. Last, there was no indication that the prosecution acted in bad faith. Therefore, the trial court did not abuse its discretion in denying defendant's request for a new trial because defendant has not established that the prosecution's noncompliance prejudiced him.

Finally, defendant argues that the prosecution's remarks during closing argument constitute prosecutorial misconduct requiring a new trial. Because defendant did not object at trial to the prosecution's remarks, our review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). The prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to its theory of the case and is not required to state inferences and conclusions in the blandest possible terms. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). Here, we find that the prosecution's remarks properly centered the jury's attention on its theory of the case and were not unduly prejudicial or intemperate.

Affirmed.

/s/ Stephen J. Markman

/s/ Henry William Saad

/s/ Joel P. Hoekstra